No. 79-176

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

BETTY OSWALD, on her own behalf and on behalf of others similarly situated, and PHIL MILLER and EILEEN MILLER, on their own behalf and on behalf of others similarly situated and SKOKIE CENTRAL TRADITIONAL CHURCH,

Petitioners,

vs.

GENERAL MOTORS CORPORATION, *et. al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

RESPONDENT GENERAL MOTORS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

THOMAS A. GOTTSCHALK
STEPHEN C. NEAL
JAMES D. ADDUCCI
Kirkland & Ellis
200 East Randolph Drive
Chicago, Illinois 60601

Of Counsel:
OTIS M. SMITH
MICHAEL J. BASFORD
LOUIS H. LINDEMAN, JR.
General Motors Corporation
3044 West Grand Boulevard
Detroit, Michigan 48202

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General Motors opposes petitioners' application for a writ of certiorari because it raises issues which have not yet been considered by the court of appeals and which are neither important nor unsettled.

COUNTER-STATEMENT OF THE CASE

Commencing in March 1977, over 300 lawsuits were filed against General Motors claiming that its interdivisional usage of engines and other components in 1977 Buicks, Pontiacs and Oldsmobiles was unlawful. The vast majority of these cases were individual and purported class actions filed in various state courts, including actions brought by many state attorneys general on behalf of their states' consumers.

Twelve individual and purported class actions were brought in federal courts alleging that the use in 1977 Oldsmobiles of V-8 engines produced in General Motors plants operated by its Chevrolet Motor Division constituted a violation of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, *et seq.* These cases were consolidated in the Northern District of Illinois for pretrial purposes pursuant to 28 U.S.C. § 1407. Over objection, that court certified a nationwide class of 1977 Oldsmobile purchasers solely on the issue of liability under the Magnuson-Moss Warranty Act. In two of the federal actions, the attorneys general of Illinois and Alabama represented consumer plaintiffs.[1]

On December 19, 1977, after lengthy negotiations, General Motors and the attorneys general of 44 states[2] (including Illinois and Alabama) announced a settlement agreement whereby each person who purchased prior to April 11, 1977,[3] a new 1977 Buick, Pontiac or Oldsmobile equipped with a

[1] The Illinois attorney general filed the first Magnuson-Moss action and the only such action to have the requisite 100 named plaintiffs.

[2] Since that time the attorneys general of four additional states have consented to the settlement terms for their consumers.

[3] This date was chosen because the extensive publicity given to this litigation and notices placed in dealer showrooms by General Motors regarding engine sources beginning in March 1977 placed pre-April 11th purchasers in a significantly different factual posture than later purchasers.

Chevrolet-produced V-8 engine would be offered $200 and, if eligible, a transferable three-year mechanical insurance certificate covering the engine and other power train components in their 1977 General Motors car. In return for this consideration, each person accepting the offer was to release his claims relating to the manufacturing source and use of components in his 1977 General Motors car.[4] The release specifically did not bar any claims for defects in any components. In return for General Motors' agreement to make this offer, the attorneys general terminated their litigation.

The agreement with the attorneys general required the offer to be communicated as soon as practicable, subject to obtaining any necessary court permission. Because of the pending federal class action and pursuant to *prior* district court request,[5] it was necessary to obtain district court permission to communicate the offer to eligible Oldsmobile purchasers who were members of the federal class. Local Civil Rule 22, N.D. Ill. Accordingly, on December 19, 1977, the attorneys general and General Motors submitted the offer to the district court for approval of its communication to eligible Oldsmobile purchasers. They further suggested that the offer be considered as a basis for settling and dismissing the Magnuson-Moss claims of

[4] The practice of using various sources to supply components for automobile manufacture is common to the automobile industry and has been engaged in by General Motors and other automobile manufacturers for many years. Thus the release of claims encompasses claims relating to the manufacturing source and use of the various components, including engines, used in 1977 General Motors cars. The release appears in Petitioners Supplemental Appendix at 93a and its precise scope and effect are controlled by the language thereof.

[5] The attorneys general's negotiations were known to private plaintiffs' counsel in the federal class action *before* the settlement was reached. The district court encouraged the negotiations to continue with the express understanding that any claims affecting the class members' claims would first have to be reviewed by that court before it was communicated.

all eligible class members.[6] Private plaintiffs' counsel (including petitioners' counsel) expressed their desire to evaluate the settlement offer as a basis for compromise of the federal class action and requested and received an opportunity to conduct discovery regarding the adequacy of the offer.

In January 1978, after the initial period for discovery into the merits of the offer was concluded, *all* plaintiffs' counsel concurred that the offer provided a promising basis for the settlement of eligible class members' claims. *See,* Transcript of Pretrial Proceedings 2/1/78 and 2/28/78. *All* plaintiffs' counsel endorsed notifying class members of the proposed settlement and scheduling a hearing on its fairness. *Id.* Counsel for petitioners actually urged General Motors to extend the offer to include class members who purchased their Oldsmobiles after April 10, 1977. Transcript of Pretrial Proceedings, 2/15/78 at 30-32. On March 16, 1978, the district court sent all class members a notice informing them that a class had been certified and advising them of their right to opt-out of the class and thereby avoid the binding impact of any further proceedings in the litigation. The notice also informed class members eligible to receive the settlement offer of its terms and that a hearing on its fairness was scheduled at which they could appear to object to the settlement if they remained in the litigation. No objections to the offer as a basis for settlement were expressed by plaintiffs' counsel prior to notifying class members of it.

On May 1, 1978 the hearing into the fairness of the proposed settlement commenced. Of the 66,872 class members to whom the settlement offer was directed only fifteen came forward to object to its fairness. Three of the twelve private

[6] In the federal litigation, 66,872 class members were eligible for the offer agreed to with the attorneys general. The agreement with the attorneys general included consideration valued at over 26 million dollars for the settlement of the claims of those eligible consumers who were also members of the federal class.

plaintiffs' counsel objected to the settlement, while six affirmatively supported it as reasonable. During the hearing, which encompassed twelve days over a three week period, the objectors to the settlement presented their evidence regarding their perception of the value of the settlement. After the hearing, the district court found the settlement to be a fair and reasonable basis for settling the claims of pre-April 11, 1977 Oldsmobile purchasers who were in the class and elected to receive the offer. Among the reasons given by the district court in its findings of fact and conclusions of law for approving the settlement was that the evidence regarding the comparability of the engines in question persuaded it that "the settlement falls well within the parameters of reasonableness and fairness." Petitioners Appendix at 71.

The petitioners appealed the finding of fairness and reasonableness to the Seventh Circuit Court of Appeals, which accepted the appeal under the collateral order doctrine. The court of appeals reversed the district court's approval of the settlement on two grounds. First, after reviewing the settlement hearing record, the court concluded that the district court abused its discretion in approving the settlement because (a) the fairness of the settlement was not established by "clear and convincing evidence," and (b) the district court did not allow discovery into the mental processes of the settlement negotiators. Second, the court of appeals struck down the proposed settlement because it required the dismissal with prejudice of the federal claims of all eligible persons who had elected to be bound by the class action, including those who thereafter were dissatisfied with the settlement.[7] Contrary to petitioners' assertions, the court of appeals did not find that the terms of the settlement offer were unfair.

The court of appeals issued directions on remand which recommended that the district court consider permitting the

[7] General Motors has filed a Petition for Certiorari, No. 79-179, seeking review of these aspects of the court of appeals' decision.

communication of the settlement offer to eligible class members on an individual basis, without using the settlement as a mandatory compromise of the class action under Rule 23(e). Such a course would allow class members to make their own decision as to whether they wished to accept the offer or to continue as part of the federal class litigation. This procedure also obviated the need for a second evidentiary hearing, and related discovery, pursuant to Rule 23(e).[8] In permitting the offer to be communicated, the court of appeals stressed that the district court should concentrate on providing an accurate and complete notice communicating the offer. 594 F.2d at 1139-40. That court gave explicit direction regarding the subjects to be considered in the notice itself, but expressly left to the district court's discretion whether a statement of the objectors' position should be included with the offer to settle claims. 594 F.2d at 1140. Petitioners unsuccessfully sought rehearing by the court of appeals of its "directions on remand." It is that portion of that court's decision which they desire the Court to review by certiorari. Requests by the petitioners to the court of appeals and Justice Stevens to stay issuance of the mandate were also unsuccessful.

Consistent with the court of appeals' direction and recommendation, General Motors moved in the district court for an order allowing communication of the settlement offer on an individual basis. A proposed form of notice communicating the offer was also submitted. The district court gave all parties full opportunity to comment orally and in writing to the notice. Two lengthy hearings were conducted on June 14 and July 5 regarding the notice. A final form of notice was approved on July 5.

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[8] In recommending that the offer be communicated individually without a further Rule 23(e) hearing, the court was fully aware that the offer was negotiated for, and the release comprehended, claims regarding the manufacturing source of all components in 1977 Oldsmobiles and not just V-8 engines which were the subject of the federal class litigation. 594 F.2d at 1116.

During the two hearings, the district court, which had extensive familiarity with the settlement from the prior hearings, stated its view that the consideration being offered is "reasonably compensatory" and not merely "nominal." Petitioners Supplemental Appendix at 73a. That court also noted its desire to follow the court of appeals' recommendation that the offer be communicated on an individual basis. In keeping with the court of appeals' view that the neutrality, accuracy, and sufficiency of the disclosure were of primary importance, the district court declined to accept petitioners' urging that it embroil the proceedings in unspecified discovery and evidentiary hearings regarding the "value" of recently asserted non-engine component "substitution" claims which had *not* been certified for federal class action treatment and which were not even pending before the court. However, the court did insist that the notice clearly inform class members that such other claims were being released by acceptance of the offer and directed that additional language and emphasis regarding this fact be added to the notice to insure its accuracy and completeness.

The district court also permitted expressions of views both by petitioners and by the proponents of the settlement to be included in the body of the notice itself. The notice, as approved, also referred class members to one of petitioners' counsel in the event further information or comment was desired. The district court exercised its discretion not to permit petitioners to send a separate letter to class members condemning the settlement and optimistically appraising the prospects for speculatively large recoveries for those class members who reject the offer.

On July 23, 1979, petitioners filed a notice of appeal and petition for mandamus in the Seventh Circuit Court of Appeals challenging the district court's order of July 5 approving the form of notice and allowing it to be sent out. On the following day, they filed motions to stay communication of the settlement

offer pending appeal before the district court and the court of appeals. The district court denied the motion for stay that same day. On July 26, a panel of the court of appeals stayed transmittal of the settlement offer until two additional sentences suggested by it were added to the notice. On July 27, the district court inserted the two sentences which (1) further explained the effects of accepting the offer and (2) re-emphasized that the release would include specified claims in addition to the claims pending before the district court. The notice has now been mailed to eligible purchasers.

ARGUMENT

Petitioners' application for a writ of certiorari is inappropriate at this time and otherwise fails to meet the standards for granting the writ.[9] The first two issues raised by the petition (regarding free speech and due process) are currently before the Court of Appeals for the Seventh Circuit on petitioners' interlocutory appeal and alternative petition for a writ of mandamus challenging the district court's approval of communication of the settlement offer. Those issues have never been passed upon by the court of appeals in this case.

In addition, those issues and the third issue raised in the petition—which questions the propriety under Rule 23(e) of a non-mandatory individual offer of settlement—question proper discretionary rulings made by the district court in accordance with the court of appeals' mandate. Petitioners' position on each issue is frivolous and rests on the erroneous notion that they alone are appointed to be the exclusive representatives of the class members, even to the point of frustrating the opportunity of class members to consider for themselves a substantial settlement offer negotiated on their behalf. The discretionary rulings made by the district court do not raise constitutional considerations nor do they conflict with any principal of law established by rule, precedent, or otherwise. Thus, the petition presents no matters worthy of the Court's review and it should be denied.

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[9] The issues raised by petitioners are as follows: (1) communication of the settlement offer to individual class members under court supervision will deny them adequate representation of counsel, and thereby, due process of law; (2) refusal to allow petitioners' counsel to communicate with class members through a particular form of communication violates the first amendment; and (3) permitting a settlement offer to go out to individual class members without a Rule 23(e) hearing is improper.

I.

THE FIRST TWO GROUNDS FOR CERTIORARI ARE PREMATURE AND NOT PROPER SUBJECTS FOR REVIEW BY THE COURT BECAUSE THEY HAVE NOT BEEN PASSED UPON BY THE COURT OF APPEALS.

Petitioners' first contention is that communication of the settlement offer to individual class members has deprived them of adequate representation of counsel and, thereby, of due process of law. Petitioners' second contention is that the district court's refusal to allow their counsel to communicate their disapproval of the settlement offer to class members in a separate letter, rather than in the notice itself, violated the first and fifth amendments to the constitution. Neither issue has been passed upon by the court of appeals and hence both are inappropriate for review by the Court at this time. It is well-settled that the Court will ordinarily not review questions not presented or passed upon by the court below. *E.g., United States* v. *Ortiz,* 422 U.S. 891 (1975); *Tacon* v. *Arizona,* 410 U.S. 351 (1973).

Petitioners are currently pursuing these two issues in the court of appeals by way of an interlocutory appeal and a petition for mandamus.[10] If the appellate court rejects petitioners' arguments, later review by the Court, with the benefit of the court of appeals' reasoning on this issue, will be available. As Justice Burton has stated: "The constitutional issue which is the subject of the appeal deserves for its solution all of the wisdom that our judicial process makes available. The need for soundness in the result outweighs the need for speed in reaching

[10] Portions of petitioners' court of appeals brief and petition for mandamus showing the issues sought to be raised there are appended to this brief. These issues are being prematurely raised before the court of appeals, as well as the Supreme Court, because there has been no final appealable order entered by the district court.

it." *Youngstown Sheet & Tube Company* v. *Sawyer,* 343 U.S. 937, 938 (1952) (dissenting from grant of certiorari).

It is especially egregious for petitioners to attempt to simultaneously obtain *de novo* review of the same issues before the court of appeals and the Court. The orderly administration of the federal court system dictates that issues be reviewed by a lower court before they are brought before the Court. Since this was not done as to two of the three issues raised by the petitioners, a writ of certiorari on those issues should be denied.

II.

THE ISSUES WHICH PETITIONERS SEEK TO RAISE ARE WITHOUT MERIT AND THEY DO NOT INVOLVE ANY CONSIDERATION THAT WOULD JUSTIFY GRANTING CERTIORARI.

The three issues on which petitioners base their petition for certiorari do not involve any consideration that would warrant issuance of the writ. Supreme Court Rule 19 states that considerations such as the following govern review by certiorari:

> Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; . . .; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

None of these reasons is presented by the instant petition. Indeed, petitioners do not even articulate these or any similar reasons or attempt to demonstrate that the issues which they raise invoke them.

A.

The District Court Did Not Violate Class Members' Due Process Rights By Permitting Communication Of A Substantial Settlement Offer To Individual Class Members.

The settlement offer was negotiated for consumers by the several state attorneys general who had themselves sued (or were threatening to sue) General Motors over the manufacturing sources of components, including engines and other power train components, used in 1977 General Motors cars. The consideration for consumers exceeds the manufacturer's suggested retail price for a V-8 engine option and offers comprehensive mechanical insurance coverage for all power train components (including transmissions). The release of claims covers only 1977 GM cars and does not extend to claims relating to alleged defects in materials or workmanship of any component.

It was necessary to consult the federal district court regarding the communication of the attorneys general offer because that court had certified an engine source claim on behalf of 1977 Oldsmobile purchasers for class action treatment. This particular claim was within the scope of the attorneys general litigation and settlement. Under Local Civil Rule 22, permission of the district court is required before class members may receive an offer to settle claims even where the offer arises out of related litigation pending in other courts and is being extended on an individual basis.

Ignoring the roles of the attorneys general, the other private counsel, and the court, in protecting class members'

interests[11] the petitioners assert that the communication of the attorneys general offer to consumers should have been arrested solely because of their desire to litigate the "value" of claims *not* presented by their complaints, *not* otherwise pending before the court, and *not* certified as class claims. Rather than raising any genuine due process considerations, petitioners' tactics reflect an effort to frustrate the ability of the judicial process to resolve multiple complex litigation on a basis that may be satisfactory and acceptable to the persons whose claims are being litigated. Petitioners' rights themselves are wholly unaffected by the communication of the offer since petitioners currently are free to reject it and to continue to prosecute their claims.[12]

The due process rights of class members are also protected by the notice given by the district court. It is a neutral notice which does not express any judicial opinion as to the adequacy of the offer. Instead, the notice allows each class member to make his own election based on full and sufficient information concerning the offer to settle, the effects of settling, and the available avenues for pursuing his claims if he does not settle. Based on that disclosure, plus the class members' own assess-

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[11] As noted above, the majority of private plaintiffs counsel in the federal litigation investigated the merits of the attorneys general offer and supported it as a fair and reasonable basis of settlement. At the fairness hearing, the district court itself heard extensive evidence presented by petitioners even on "transmission" issues and was persuaded of the settlement's reasonableness.

[12] Petitioners' insistence on ascertaining the "value" of claims not presented by their complaints is nothing more than an attempt to expand the litigation and to require the equivalent of a trial on the merits before a settlement offer may be communicated. The district court was satisfied that the consideration being offered was substantial for the class claim pending before it and assured that the class notice informed class members of the existence of other potential claims, including where they were being litigated, and the effect of accepting the settlement offer on those other claims.

ment of his particular circumstances, including the performance of his car, each class member is in a position to make an informed choice as to whether or not to accept the offer.[13]

If anything offends basic principles of fairness, it is petitioners' notion that the unacceptability of the settlement offer to them should preclude its consideration and acceptance by others who may prefer its benefits.

> Indeed, if anything strikes this Court as unfair or unreasonable it is the paternalistic notion that it is in the best interests of competent adults that they be deprived of their right to receive and freely choose whether to accept or reject defendants' compromise offer.

Rodgers v. *United States Steel Corporation,* 70 F.R.D. 639, 644 (W.D. Pa. 1976.), *appeal dismissed* 541 F.2d 365 (3d Cir. 1976).

Due process is respected, and not offended, when the judicial process leaves to the party in interest, rather than his co-party or a minority of class counsel, whether to accept a settlement or to continue the pursuit of his claims. Where, as here, that decision is made following full notice of the status of the litigation, its scope, and the possible future outcomes of the litigation, due process considerations, such as they may exist, have been fully satisfied.

Petitioners have cited no authority in support of the proposition that due process rights of class members have been violated by the procedures adopted and implemented to protect those class members' interests in this case. The first issue raised by the petition is, for all the reasons stated, not a proper basis for a grant of certiorari.

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[13] Petitioners' assertion that their counsel is unable to form an opinion as to whether to recommend acceptance of the settlement offer (Petition For Certiorari at 6) is specious. In fact, petitioners have expressed their view that the settlement should be rejected and, as discussed next, that they should have been allowed additional means of communicating their opinion to other class members.

B.

By Including A Statement Of Objectors' Views In The Notice Itself, In Lieu Of A Separate Letter, The District Court Did Not Violate Any Constitutional Rights.

Petitioners' second contention is that the district court's refusal to allow their counsel to communicate their disapproval of the settlement offer to class members in a separate letter, rather than in the notice itself, violated the first and fifth amendments to the Constitution. The district court allowed petitioners to express their opposition to the settlement in the body of the notice itself. The argument that the Constitution required a separate letter to be sent is wholly unfounded.

The court of appeals held that "[w]hether the offer to settle should contain a statement by the plaintiff-objectors of their opinion of the adequacy of the settlement package in order to make the communication a full and complete disclosure is a matter left to the trial court's discretion." 594 F.2d at 1140. In the exercise of its discretion, the district court decided that a fair and neutral statement from that court, which included an expression of views by the objectors and proponents, would do more to inform class members than a confusing "war of letters." Petitioners Supplemental Appendix at 20a-21a. To so conclude was an appropriate exercise of the district court's discretion, which in no way precluded the objectors' viewpoint from reaching class members.[14]

Petitioners' claim that they or their counsel are imbued with a first amendment right to send a separate letter to class members is erroneous. The need for and propriety of judicial

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[14] Respondent does not concede that any class action plaintiff has a first amendment or any other right to communicate his views to class members separate from the views of other class plaintiffs. Nor does such a right exist independent of prior review and control by the federal court upon whose authority the class has been formed and the claimed right of representation exists.

control over communications with class members regarding the class action is firmly established. The court of appeals so recognized. 594 F.2d at 1138, n.57 (citing *inter alia Manual For Complex Litigation,* § 1.41, and Local Civil Rule 22 of the Northern District Court of Illinois). The potential for abuse and confusion affords considerable justification for the principle that those persons accorded class representative status by the district court must accept its supervision in their communications with class members.

The situation presented here is totally unlike that found in *Chicago Council of Lawyers* v. *Bauer,* 522 F.2d 242 (7th Cir. 1975), *cert. denied* 427 U.S. 912 (1976). That action involved a local rule restricting lawyers' ability to comment publicly on pending litigation. In contrast, petitioners here have been allowed to express their views to the class in the notice. They have been permitted, also in the notice itself, to identify one of their counsel in case class members wish to contact him. Moreover, without commenting on the propriety of his conduct, it should be noted that petitioners' counsel has not been restrained from denouncing the settlement offer and its mailing in press interviews. *See, e.g., Chicago Tribune,* July 27, 1979, Sec. 1, p. 6. Under these circumstances, no first amendment rights have been violated and, indeed, no significant free speech questions are even suggested.[15]

Neither have class members been denied any fifth amendment right to effective assistance of counsel, to the extent it may exist in a civil case, by the district court's exercise of control over the forms of communication between class members and

[15] The decision in *Rodgers* v. *United States Steel Corporation,* 536 F.2d 1001 (3rd Cir. 1976), similarly affords no support to petitioners' novel assertion. That case involved a challenge to a protective order absolutely barring plaintiffs' counsel from mentioning specific information to class members. No such bar has been imposed in this case.

petitioners' counsel. The rights of class members have been adequately safeguarded by the full notice required by the court of appeals which enables them to decide whether or not to accept the offer. Moreover, petitioners constitute a minority of the class representatives. Petitioners' claim to advise class members is in no way superior to that of the majority of the private plaintiffs and counsel who support the settlement or of the attorneys general who, under state law, are authorized to sue on their citizens' behalf.

Ultimately, it is the courts which serve as the guardians of the class interests. The district court has performed this role by permitting class members to decide for themselves whether to accept a settlement offer which is described in an accurate, complete, and neutral notice that includes the respective positions of the settlement's proponents and objectors. By denying petitioners one particular form of communication for expressing their views, but allowing their views to be expressed in other forms, the district court acted well within its permissible discretion.

Thus petitioners' second contention also cannot serve as a legitimate basis for the grant of a writ of certiorari.

C.

A Class Action Court Has Discretion To Permit Communication Of Individual Settlement Offers To Class Members Without Approving The Settlement Terms As A Mandatory Compromise of The Class Action Under Rule 23(e).

Under the court of appeals' decision, an offer to settle claims negotiated in other litigation may be communicated to members of a federal class on a non-mandatory, individual basis, subject to the district court's approval. Since the class action litigation continues in such circumstances, Rule 23(e) has no application, and an evidentiary hearing to determine

whether the offer would also be a fair and adequate basis for compromising and resolving all class members' claims is not required. Nonetheless, petitioners here, who have chosen to continue to pursue the class litigation, protest that a Rule 23(e) hearing was an immutable requirement before class members could even consider the settlement offer.[16]

The allowance of a settlement offer to be extended to individual members of a class without Rule 23(e) approval, provided that the settlement is not used as a basis for dismissal of the class action itself, is supported by a great deal of precedent. *See Weight Watchers of Philadelphia, Inc.* v. *Weight Watchers International, Inc.*, 455 F.2d 770, 773 (2d Cir. 1972); *Vernon J. Rockler & Company* v. *Minneapolis Shareholders Company*, 425 F. Supp. 145, 149-50 (D. Minn. 1977); *Chrapliwy* v. *Uniroyal, Inc.*, 71 F.R.D. 461, 464 (N.D. Ind. 1976); *Rodgers* v. *United States Steel Corporation*, 70 F.R.D. 639, 642 (W.D. Pa. 1976), *appeal dismissed* 541 F.2d 365 (3d Cir. 1976); *Dickerson* v. *U.S. Steel Corporation*, 11 EPD ¶ 10,848 (E.D. Pa. 1976); *American Finance System, Inc.* v. *Harlow*, 65 F.R.D. 572, 575-76 (D. Md. 1974); *Korn* v. *Franchard Corporation*, 388 F. Supp. 1326, 1329 n.4 (S.D.N.Y. 1975); *Nesenoff* v. *Muten*, 67 F.R.D. 500, 503 (E.D.N.Y. 1974); *Matarazzo* v. *Friendly Ice Cream Corporation*, 62 F.R.D. 65, 69 (E.D.N.Y. 1974); *Wolf* v. *Barkes*, 348 F.2d 994, 995-96 (2d Cir. 1965), *cert. denied* 382 U.S. 941 (1965). There is no conflict among the circuits on this point and it does not present an important, unsettled question of federal law.

Communication of individual settlement offers to class members ordinarily should be supervised by the courts. *Mata-*

[16] After a twelve day hearing the district court found the settlement to be fair and reasonable as a settlement of the class litigation. Contrary to petitioners' repeated assertion that the court of appeals "disapproved" the settlement, that court held that the settlement was properly communicated on an individual, not a mandatory, basis without the need for further evidentiary hearings.

razzo, supra, 62 F.R.D. at 69 n.4. Court supervision safeguards the class member's free choice, *Korn, supra*, 388 F. Supp. at 1333, and assures that other class members' rights are not prejudiced, *Vernon J. Rockler & Company, supra*, 425 F. Supp. at 150. An adequate notice describing the offer and its effects, coupled with an express statement of the court's neutrality, is certainly sufficient to protect the class member from undue influence. *See Chrapliwy, supra*, 71 F.R.D. at 464; *American Finance System, Inc., supra*, 65 F.R.D. at 576. So long as the class action continues and the claims of those rejecting the offer are not extinguished, the settlement does not legally bind or otherwise prejudice their rights. *Weight Watchers of Philadelphia, Inc., supra*, 455 F.2d at 770; *Nesenoff, supra*, 67 F.R.D. at 503; *see Shelton* v. *Pargo, Inc.*, 582 F.2d 1298, 1314-15 (4th Cir. 1978).

These authorities recognize that Rule 23(e) provides for court approval and notice of class action settlements *only* when the class action itself is dismissed or compromised. Rule 23(e) itself provides that: "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." Thus, offers to settle individual claims do not fall under this rule and do not require court approval. Such offers may be controlled, however, to assure that undue influence is not exerted on the individual receiving the offer. Rule 23(d)(2), Fed. R. Civ. P.; *Chrapliwy, supra*, 71 F.R.D. at 464; Dole, *The Settlement of Class Actions for Damages*, 71 Colum. L. Rev. 971, 995 (1971).

A strict rule precluding individual class members from accepting settlement terms which they regard as favorable would be unwise, as well as contrary to precedent. A number of circumstances may arise in which it is desirable to allow a class member to consider a settlement offer in order to obtain a

prompt resolution of his claims, even though the class action may not be extinguished. See Dole, *supra,* 71 Colum. L. Rev. at 997. For example, the offer may be substantial and represent a meaningful opportunity to resolve class members' claims without further risk or delay. In other cases, the class representatives may be seriously divided over whether the offer should constitute a basis for dismissal of the class claim. In other situations, the offer of settlement may arise out of related and overlapping representative litigation pending in other forums. All of these situations cited are presented by the instant case.

The desirability of permitting individual settlement offers to be communicated is illustrated by the closely analogous decision in *Rodgers* v. *United States Steel Corporation,* 70 F.R.D. 639 (W.D. Pa. 1976), *appeal dismissed* 541 F.2d 365 (3d Cir. 1976). A year after that action was certified as a class action, the defendant sought leave to communicate a settlement offer, including a general release of claims, to members of the plaintiff class pursuant to the terms of an industry-wide consent decree filed in another federal jurisdiction. The *Rodgers* court expressly found Rule 23(e) inapplicable because the offer was not a "settlement of the *Rodgers* class action itself." 70 F.R.D. at 643. Instead, the court found the offer to present a "*meaningful* tender of immediate, litigation-free back pay that does no more than offer its recipient the option of presently accepting it or rejecting it." *Id.* at 644. More fundamentally, the court recognized that a class action should not interpose a barrier to a class member's right freely to choose whether he wishes to accept a meaningful settlement offer. After reviewing and approving the adequacy of the proposed notice, the offer was permitted to be communicated.

This "satisfaction-of-claims approach reduces the burden of representative litigation on the courts." Dole, *supra,* 71 Colum. L. Rev. at 997. It also serves the recognized policy of encouraging settlements. *Patterson* v. *Stovall,* 582 F.2d 108,

112 (7th Cir. 1976); *Weight Watchers of Philadelphia, Inc.,* v. *Weight Watchers International, Inc.,* 455 F.2d 770, 773 (2d Cir. 1972). Since communications are placed under the court's control to prevent undue influence and to assure that other class members' interests will not be prejudiced, the suggested procedure has adequate safeguards to protect against its abuse.

In recommending that this course be followed, the appellate court incorporated all the limitations and safeguards suggested by the many cases approving communication of individual settlement offers. The class action will continue, subject to the risks and uncertainties of litigation, as to those eligible class members who choose to reject the offer.

Petitioners also raise the specter of piecemeal settlements being extended to fragment the class and ultimately to destroy its viability. However, that specter is not present in this case. The settlement offer extended here is part of a comprehensive settlement of related litigation pending elsewhere, for which permission of the federal court was required under its local rules before being extended to Oldsmobile purchasers and which does not effect the viability of the purported class action. In any event, where improper settlements may be threatened, the courts have adequate authority to prevent or redress any real abuses.

Petitioners also attempt to undercut the effect of *Weight Watchers of Philadelphia, Inc., supra,* by pointing out that this decision dealt with pre-certification class members whereas the instant case deals with post-certification class members. This is a distinction without a difference. In fact, individual settlement offers have been authorized without conducting Rule 23(e) approval hearings in at least three post-certification cases. *Chrapliwy* v. *Uniroyal, Inc.,* 71 F.R.D. 461, 464 (N.D. Ind. 1976); *Rodgers* v. *United States Steel Corporation,* 70 F.R.D. 639 (W.D. Pa. 1976), *appeal dismissed* 541 F.2d 365 (3d Cir. 1976); *Dickerson* v. *U.S. Steel Corporation,* 11 EPD ¶10,848

(E.D. Pa. 1976)[17] No policy consideration supports the stark distinction which petitioners attempt to draw between putative and certified class actions. In reviewing settlement offers, federal courts tend to treat putative class actions as though certified from the time of filing. *See Susman* v. *Lincoln American Corporation,* 587 F.2d 866, 869, 870-71 (7th Cir. 1978); *Shelton* v. *Pargo, Inc.,* 582 F.2d 1298 (4th Cir. 1978); *Roper* v. *Consurve, Inc.,* 578 F.2d 1106, 1110 (5th Cir. 1978), *cert. granted* 99 S.Ct. 1421 (1979). In either situation, the court will review the settlement offer to assure that undue influence has not been exercised over the settling class members and that other absent class members' rights have not been prejudiced.[18]

Both precedent and policy weigh heavily against petitioners' request that the Court establish a rule barring the communication of settlement offers to individual class members without first having conducted a Rule 23(e) evidentiary hearing needed in approving mandatory compromises of class actions as fair and reasonable. Thus, petitioners' third contention of error is also without merit.

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[17] See also derivative cases in which post-filing settlement offers have been upheld. *Wolf* v. *Barkes,* 348 F.2d 994 (2d Cir. 1965), *cert. denied* 382 U.S. 941 (1965); *Vernon J. Rockler & Company* v. *Minneapolis Shareholders Company,* 425 F. Supp. 145 (D. Minn. 1977). Many of the standards developed in derivative suits apply equally well to class action settlement procedures. *See generally, Developments in the Law—Class Actions,* 89 Harv. L. Rev. 1318, 1539 (1976).

[18] The commentators likewise draw no distinction between putative and certified classes in discussing court-supervised communication of individual settlement offers. Wright & Miller, *Federal Practice & Procedure, Civil § 1797 (1978 Pocket Part) (p. 47); Dole, supra,* 71 Colum. L. Rev. at 995.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

DATED: September 4, 1979

Respectfully submitted,

THOMAS A. GOTTSCHALK
STEPHEN C. NEAL
JAMES D. ADDUCCI
Kirkland & Ellis
200 East Randolph Drive
Chicago, Illinois 60601

Of Counsel:
OTIS M. SMITH
MICHAEL J. BASFORD
LOUIS H. LINDEMAN, JR.
General Motors Corporation
3044 West Grand Boulevard
Detroit, Michigan 48202

APPENDIX

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 79-1843

IN RE GENERAL MOTORS CORPORATION ENGINE INTERCHANGE LITIGATION

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
Honorable FRANK J. MCGARR, *Judge Presiding.*

BRIEF AND ARGUMENT OF PLAINTIFFS-OBJECTORS BETTY OSWALD, EILEEN MILLER AND PHIL MILLER

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Is the trial court's order of July 5, 1979 reviewable at this time?

2. Did the District Court abuse its discretion and deny class members due process of law by approving communication of the settlement offer without conducting a hearing to determine the value of the transmission claim?

3. Does the District Court's refusal to allow objectors' counsel to communicate with class members explaining and evaluating the offer of settlement violate the First Amendment as a prior restraint on the speech of objectors' counsel?

4. Does the District Court's refusal to allow objectors' counsel to send a letter to class members explaining their objections to and evaluation of the settlement offer deny class members due process of law and violate their First Amendment right to receive full information about their lawsuit?

* * * *

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

BETTY OSWALD, EILEEN MILLER and PHIL MILLER and MICHAEL J. BALOG, on behalf of themselves and all others similarly situated,

Petitioners,

-Vs-

FRANK J. McGARR, U.S. District Judge,

Respondent.

PETITION FOR WRIT OF MANDAMUS

Now comes Betty Oswald, Eileen Miller and Phil Miller and Michael J. Balog, on behalf of themselves and all others similarly situated, petitioners in the above entitled action and pursuant to Rule 21 of the Federal Rules of Appellate Procedure and petition this court to issue a Writ of Mandamus directing the Honorable Frank J. McGarr, Judge of the United States District Court for the Northern District of Illinois, Eastern Division, to vacate the order approving communication of the offer to settle claims in the above-entitled action now pending in that court.

* * * *

ISSUES

1. Did the district court abuse its discretion and deny class members due process of law in approving the communication of a settlement offer in this case which would release claims for

the substitution of component parts other than engines, which the district court stated is not a part of this case.

2. Did the district court abuse its discretion and deny members due process of law in failing to conduct a hearing testing whether the consideration in the subject offer was only "nominal consideration" in view of the court's determination that this case concerns only engine interchanges?

3. Does the district court's refusal to allow petitioners' counsel to communicate with class members explaining the objections to the settlement offer violate the First Amendment as a prior restraint on the speech of petitioners' counsel?

4. Does the district court's refusal to allow petitioners' counsel to communicate with class members explaining the objections to the settlement, thereby preventing counsel from communicating relevant information to class members, deny class members due process of law and violate their First Amendment right to be fully informed about this action?

* * * *